88-1601

No. 88-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PULLMAN-STANDARD, INC., A SUBSIDIARY OF THE PULLMAN COMPANY,
Petitioner,

—v.—

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In light of *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), did the Court of Appeals err in (a) allowing plaintiffs to establish a disparate impact challenge to a subjective, multicriteria selection system for supervisor promotions through a gross, "bottom line" comparison between the percentage of black supervisors and the percentage of blacks in the workforce, rather than a comparison to the subgroup of promotion-eligible black workers; (b) shifting to the employer the burden of persuasion to prove the necessity of its requirements for such promotions; and (c) improperly commingling disparate treatment and disparate impact theories?

2. Did the Court of Appeals violate the strictures of *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), as well as the requirements of Article III of the Constitution, in allowing employees who were hired before the effective date of Title VII of the Civil Rights Act of 1964, and who never asserted individual claims of discriminatory denial of a supervisor promotion, to serve as representatives of a class challenging allegedly discriminatory post-Title VII initial assignments and promotion practices?

3. Did the Court of Appeals ignore this Court's ruling in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), by reaffirming its 1980 decision (a) overturning the District Court's findings on the absence of discriminatory intent in the Company's initial departmental assignments and on the business necessity of the Company's requirements for supervisor promotions, and (b) substituting its own independent determination on these issues rather than remanding to the District Court for appropriate findings?

4. In light of *Owens* v. *Okure*, 109 S. Ct. 573 (1989), did the Court of Appeals err in measuring the liability period for the 42 U.S.C. § 1981 claim by reference to Alabama's six-year "nonresidual" statute for personal injury actions?

LIST OF PARTIES

Petitioner Pullman-Standard, Inc. ("Pullman" or "the Company") is a subsidiary of The Pullman Company. Respondents are Louis Swint and Willie James Johnson, as representatives of a certified class of "all black persons who at any time subsequent to one year prior to the filing of any charges with the [Equal Employment Opportunity Commission] had been employed by Pullman (at its Bessemer[, Alabama] plant) as production and maintenance workers in positions represented by the United Steelworkers."*

Pursuant to Rule 28.1, petitioner informs the Court that The Pullman Company is wholly owned by Pullman Holding Corporation, which is in turn wholly owned by Affiliates of Forstmann Little & Company, a limited partnership.

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* *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 948 n.20 (N.D. Ala. 1974) (App. 94a). The decision sought to be reviewed consolidated three appeals (Nos. 87-7057, 86-7886 & 84-7319). This petition seeks review only of appeals No. 87-7057 and No. 86-7886.

Copies of this petition also have been served on counsel for Clyde Humphrey, who was listed as a party in the caption of the ruling below even though his individual claim as intervening plaintiff had been decided against him on August 30, 1976, and he had not been served with notices of appeal or court papers since that date; for United Steelworkers of America, AFL-CIO, Local 1466 of the United Steelworkers of America, AFL-CIO, and International Association of Machinists, AFL-CIO, who were defendants-appellees in the decision sought to be reviewed; and for William B. Larkin, Louise Seals, purportedly as personal representative of Spurgeon Seals, deceased, Lillie Lofton, purportedly as personal representative of Edward Lofton, deceased, and Jesse B. Terry, who were plaintiffs-appellants in appeal No. 84-7319.

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No. 88-____

PULLMAN-STANDARD, INC., A SUBSIDIARY OF THE PULLMAN COMPANY,

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—v.—

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action in appeal Nos. 87-7057 and 86-7886.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 854 F.2d 1549, and is reprinted in the Appendix ("App.") hereto at p. 1a. The unreported memorandum opinions of the District Court (N.D. Ala.) dated September 8, 1986 and November 26, 1986 are reprinted at App. 262a-285a. Prior rulings in this litigation relevant to this petition are described below and reprinted in the Appendix.

JURISDICTION

The decision of the Court of Appeals (App. 1a–61a) was entered on September 21, 1988 and a timely petition for rehearing was denied on January 3, 1989 (App. 289a–291a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent text of Article III of the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and Rules 23(a) and 52(a) of the Federal Rules of Civil Procedure is set out at App. 292a–298a.

STATEMENT OF THE CASE

This litigation was previously before this Court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (App. 231a–258a), which held that a 1980 ruling of the then Fifth Circuit,[3] reversing a determination of the trial court, had transgressed the limits of proper appellate review by substituting its own findings on the question of the legality of the seniority system maintained at Pullman's Bessemer, Alabama plant.[4] The instant petition seeks review of the now Eleventh Circuit's decision reversing, once again, the trial court by ruling that Pullman's supervisor promotions from 1966 to 1974 worked an unjustified disparate impact under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, and that its departmental assignments of new hires from 1965 to 1969 were "infected" by intentional racial discrimination in violation of Title VII and 42 U.S.C. § 1981 ("§ 1981"). That decision imposes liability on Pullman on the basis of the very *de novo* appellate factfinding this Court rejected in *Swint* by means of

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3 *Swint* v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) (App. 207a–230a).

4 Until it closed in 1980-81, Pullman's plant in Bessemer, Alabama manufactured special order railway freight cars and parts.

an analysis that fails even to take account of, let alone apply, this Court's intervening decision in *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988).

A. Class Certification

In December 1971, Louis Swint and Willie James Johnson filed a class action alleging that Pullman and the United Steelworkers of America, AFL-CIO and its Local 1466 (collectively "USW") had engaged in racially discriminatory employment practices in violation of Title VII and § 1981. Plaintiffs focused their challenge on the departmental seniority system maintained under Pullman's collective bargaining agreements with the USW (covering 26 departments) and with the International Association of Machinists, AFL-CIO ("IAM") (covering 2 departments), claiming it unlawfully perpetuated the effects of pre-Title VII discrimination.

Under the Fifth Circuit's then prevailing "across-the-board" approach to Title VII class actions, the District Court certified, without a hearing, Swint and Johnson as representatives of a class[5] with respect to four "class issues": (1) whether the departmental seniority system perpetuated the effects of past discrimination in the assignment of black employees among the various departments; (2) whether there had been discrimination in the assignment of work to persons within the same department; (3) whether there had been discrimination in promotions to supervisory positions; and (4) whether there had been discrimination in the failure to post changes in assignments.[6] The District Court's determination that there was no discrimination

5 The class was defined as "all black persons who at any time subsequent to one year prior to the filing of any charges with the EEOC had been employed by Pullman (at its Bessemer plant) as production and maintenance workers in positions represented by the United Steelworkers." *Swint v. Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 948 n.20 (N.D. Ala. 1974) (App. 94a).

6 In the same action, Swint and Clyde Humphrey as intervenor-plaintiff asserted individual claims challenging their discharges. The District Court found that there was no racial discrimination or unlawful retaliation in connection with their discharges, and this determination was affirmed on appeal. *Swint v. Pullman-Standard* (*Swint II*), 539 F.2d 77, 105 (5th Cir. 1976) (App. 139a).

on issues (2) and (4) was sustained on appeal. With respect to issue (1), following this Court's *Swint* decision, the District Court upheld the seniority system under Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), and was affirmed by the Eleventh Circuit.

As the litigation evolved, however, an independent issue emerged concerning whether Pullman had engaged in intentional post-Act discrimination in its departmental assignments of new hires ("initial assignments"), which, along with the supervisor promotions issue, are the subject of this petition. However, since both of the named plaintiffs were hired before the effective date of Title VII,[7] neither had a personal stake, at the time of certification, in the challenge to post-Act initial assignments. Moreover, neither of the named plaintiffs had ever alleged an individual claim of discriminatory denial of a supervisory position[8] and hence lacked a personal stake in the promotions challenge as well.[9]

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7 Title VII became effective on July 2, 1965. Swint was hired on November 24, 1964; Johnson was hired on January 12, 1956 (1974 Tr. 884, 1054; App. 298a-299a, 300a).

8 Indeed, while an employee, Swint actively encouraged other black employees to reject offers of promotion to supervisor (1974 Tr. 1775-76, 2505-07, 2550-53; App. 300a-305a), was known to regard those blacks who were supervisors as "Uncle Toms" (*id.* 2505-07, 2550-53; App. 302a-305a), pressured black supervisors to resign their positions (*id.* 3206-8; App. 305a-306a), and, as the trial court found, was discharged because of "insubordination . . . directed toward a black foreman," *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 960 (N.D. Ala. 1974) (App. 88a); Johnson was made a temporary foreman at one point and was offered a foreman position in 1974 which he declined because of poor health (1974 Tr. 899, 938; App. 299a-300a).

9 In 1975, four other black employees (William Larkin, Spurgeon Seals, Edward Lofton and Jesse Terry) filed a race discrimination suit against Pullman. Their appeal (No. 84-7319) from the District Court's denial of their motion under Fed. R. Civ. P. 60(b)(6) to transform a 1976 dismissal with prejudice into a dismissal without prejudice was affirmed by the Eleventh Circuit below. The Court of Appeals reasoned that there was no justification for reopening their case, that the interests of the "*Larkin* plaintiffs" were amply represented in the *Swint* class, and that any additional evidence

B. 1974 Trial and Appeal

After sixteen days of testimony and submission of numerous exhibits, the District Court in 1974 concluded, *inter alia*, that plaintiffs had not proven that the seniority system was unlawful or that the selection of supervisors was discriminatory. *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 961 (N.D. Ala. 1974) (App. 90a). Concerning departmental assignments, the District Court found that because of a 1965 arbitration award opening up previously all-white jobs to blacks, "the company began implementing a program to eliminate barriers to advancement by blacks. . . ." *Id.* at 947 (App. 65a). This effort included an agreement with the Department of Labor, establishing procedures for integrating previously segregated departments, and providing seniority carryover rights for black employees hired prior to 1965 who transferred to formerly all-white departments as well as preferential promotion rights in certain departments. The court further determined that "the company's assignments from 1965 to 1974 discloses an obvious effort . . . to 'correct' the racial imbalances in the departments. Those departments which in 1965 had been predominantly of one race are, without exception, closer in 1973 to the racial ratio for the plant as a whole; and those departments which had been exclusively of one race are, with one exception, no longer 'segregated.'" *Id.* at 951 (App. 71a).[10] The court found, however, that Pullman had violated Title VII insofar as

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of discrimination could have been readily presented through the *Swint* litigation. *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549, 1583-84 (11th Cir. 1988) (App. 59a-60a). The same counsel represented both the *Larkin* plaintiffs and the *Swint* class. *See Swint* v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S, slip op. at 3 n.6 (N.D. Ala. Sept. 8, 1986) (App. 264a-265a).

10 The court here referred to the Janitors department where two whites had been assigned during the 1965-73 period but subsequently quit. *Swint I*, 11 FEP Cas. at 951 (App. 71a).

six departments remained of single-race composition up until June 1971. *Id.* at 953-54 (App. 77a).[11]

With respect to supervisor promotions, the District Court found that salaried foremen—positions outside of the bargaining unit—were chosen from the ranks of successful hourly (or temporary) foremen, and that "approximately 20% of [salaried foremen] promotions since mid-1965 have been of blacks, a percentage that is not really disproportionate to the composition of the source group when one takes into account the pre-1965 hourly foremen (all-white) and the necessity of some lag time for demonstration of satisfactory performance as an hourly foreman." *Id.* at 958 (App. 84a).[12] Reviewing individual instances of failure to promote blacks, the court found that "[t]he evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications." *Id.* at 958 n.50 (App. 102a). The court concluded that Pullman's use of subjective judgment in selecting supervisors was not discriminatory.

On appeal, the Fifth Circuit reversed many of the District Court's findings. *Swint* v. *Pullman-Standard* (*Swint II*), 539 F.2d 77 (5th Cir. 1976) (App. 104a). Without deciding whether plaintiffs had established a prima facie case on departmental assignments, the panel held that the trial court had unduly narrowed its inquiry, and directed it to consider on remand evidence of discrimination in mixed-race departments, the racial composition of the two IAM departments, whether past dis-

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11 The District Court's determination here was derived entirely from the absence of employees of the opposite race in those departments. In its 1977 ruling on remand, the court concluded that as to these departments, its previous determination had been incorrect. *See* note 15, *infra*.

12 The district judge found that any difference between the selection rate for black hourly foremen and the percentage of blacks in the work force was fully explained by the fact that a greater proportion of black employees were functionally illiterate or minimally literate, had declined opportunities to become hourly foremen, and, due to pre-Act segregation, needed some time to learn the range of skills necessary to perform supervisory duties. *Swint I*, 11 FEP Cas. at 957-58 (App. 83a-84a).

crimination in the departments covered by the Labor Department agreement was probative of a plant-wide discriminatory policy, and whether the special skills that the District Court found were required for assignment to two departments (Welding and Maintenance) were justified by "business necessity." *Id.* at 94-98 (App. 123a-128a).[13]

On the promotions issue, the Fifth Circuit apparently agreed with the trial court's general approach of determining whether the black selection rate for salaried foremen could be explained by reference to the racial composition of the source group—*i.e.*, hourly foremen. The court held, however, that two of the factors cited by the trial judge in explaining the relative shortfall in black hourly foremen—functional illiteracy and the time lag (due to pre-Act discrimination) in acquiring supervisory skills—could not be considered in the absence of a showing of business necessity. The Fifth Circuit did agree, however, that evidence of a disproportionate number of refusals of offers of promotion by black employees and "the recent dramatic improvement in black promotions to salaried supervisor . . . clearly indicative of the lack of discrimination in promotion" could be treated as "counterbalancing evidence" in rebuttal of the plaintiffs' statistical showing. *Id.* at 104 (App. 138a). Here, too, the Court of Appeals expressly declined to decide whether plaintiffs had made out a prima facie showing of discrimination. *Id.* at 104-05 (App. 138a).

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13 The District Court had found that because a high proportion of jobs in the Welding and Maintenance departments required special skills and "typically have been filled by 'off-the-street' employment of persons already possessing requisite qualifications," "[b]are statistics showing only the racial composition of the employees in those departments do not—absent a study of the qualifications of the applicants or at least a showing of examples in which qualified blacks were not assigned to such departments—evidence discriminatory assignments thereto." *Swint I*, 11 FEP Cas. at 950 (App. 70a). The Court of Appeals, however, was of the view that "[t]he question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show the absence of qualifications." *Swint II*, 539 F.2d at 89 (App. 113a) (emphasis in original).

C. Post-*Teamsters* Proceedings and 1980 Appeal

While the case was on remand in the trial court, this Court rendered its decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). Relying on *Teamsters*, the District Court upheld Pullman's seniority system as *bona fide* within the meaning of § 703(h) of Title VII. *Swint* v. *Pullman-Standard* (*Swint III*), 15 FEP Cas. (BNA) 144 (N.D. Ala. 1977) (App. 156a). The trial court then turned to the question of discrimination in initial assignments after December 27, 1966.[14] The trial judge concluded, in the most unequivocal terms, that the statistics on post-1966 assignments could

> "give rise to no inference that assignments were being made to further a policy of segregated or racially-imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white and predominantly-white ones." *Swint III*, 15 FEP Cas. at 148 (App. 160a).

The court also addressed the pointed inquiries of the *Swint II* panel, and found that segregation had been totally abandoned after 1965 and "with the demise of the segregated job practice, so also went the ancillary practice of making departmental assignments based on race." *Id.* at 149 (App. 162a). The court concluded that the plaintiffs "have therefore failed to establish an essential element of their claim." *Id.*[15]

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14 This date was considered the "earliest possible" anterior date on the basis of a March 27, 1967 EEOC Commissioner's charge, even though the court had substantial reservations about using a Commissioner's charge to date liability when the instant private lawsuit grew out of later filed individual charges. *Swint III*, 15 FEP Cas. at 146 n.5 (App. 173a-174a). The date was later changed to September 28, 1966 in *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549, 1567 (11th Cir. 1988) (App. 28a).

15 Acknowledging that this finding was inconsistent with its determination in *Swint I* concerning the six single-race departments, the District Court

Turning to the supervisor promotions question, the District Court held that whatever prima facie showing plaintiffs had made "has been rebutted and that Pullman did not discriminate against blacks in such promotions in the time frame covered by the EEOC charges." *Id.* at 151 (App. 166a). The court explained that gross comparisons of the percentage of black supervisors with the percentage of blacks in the labor market or with the percentage of blacks in the work force were inappropriate. Rather, "[i]t is clear from the evidence, if not from common sense, that special skills are needed by supervisors and that . . . all workers are not 'fungible' when it comes to selection of supervisors." *Id.* at 150 (App. 165a). Relying on *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), the District Court determined that the appropriate source group for salaried foremen was the ranks of hourly foremen, and when a comparison is made between these two groups, "it is found that the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen for the period." *Swint III*, 15 FEP Cas. at 151 (App. 166a).

The District Court proceeded to examine whether there had been post-1966 discrimination in the selection of hourly foremen. The trial judge found that "[p]romotions of temporary foremen are departmental in all aspects,"[16] and that [t]he

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determined that "its original decision, based largely upon a mechanical application of statistical data respecting a few departments, was incorrect," since "there was not a policy of discriminatory assignments respecting these six departments after 1966 anymore than there was respecting the other departments." *Swint III*, 15 FEP Cas. at 149 (App. 162a). As for the two IAM departments, the trial court concluded that "with respect to these departments, as with the other twenty-six departments, there was no policy or practice of discriminatory assignments after December 1966." *Id.* at 150 (App. 163a).

16 The trial judge explicitly found that "[o]f the 415 monthly promotions reported from January 1969 through May 1974, 403—or 97%—were

restriction of such temporary promotions to persons working in the department is a bona fide occupational qualification, justified by business necessity, under the evidence in this case." *Id.* at 151 (App. 167a). Here, any short-fall in the number of black hourly foremen[17] was due to the disproportionately higher rate of black refusals of hourly foreman promotions. *Id.* at 152 (App. 170a).

On appeal,[18] the Court of Appeals once again reversed. *Swint* v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) (App. 207a). While this Court subsequently overturned the Fifth Circuit's reliance on its "ultimate fact" doctrine with respect to the seniority system issue, *de novo* appellate factfinding pervades all of *Swint VI*. Thus, with respect to initial assignments, the Court of Appeals was of the view that the trial judge had made some erroneous calculations with respect to the two IAM departments. It then summarily concluded that all of the District Court's findings were "factually unsubstantiated" and that although "the company made significant advancements in the elimination of previous all-black and all-white departments subsequent to 1966, the total employment picture indicates that departmental assignments

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appointments of a person then in the department. Of the 13 'inter-departmental' temporary promotions, virtually all involved an assignment to closely related work, *e.g.*, an Inspector to the department in which he performed his duties or an Assembler from one department being assigned as foreman for assembly work in another department." *Swint III*, 15 FEP Cas. at 151 n.18 (App. 176a). For promotions in two departments, however, the court found "that only Welders would be qualified to act as temporary foremen in the Welding Department and only persons with experience as a Riveter, Assembler or Heater would be qualified to act as temporary foremen in the Steel Erection Department." *Id.* at 152 (App. 169a).

17 The court found that 149 black hourly foremen were appointed from 1967 through May 1974, as contrasted with an expected figure of 175. *Swint III*, 15 FEP Cas. at 151 (App. 168a).

18 After *Swint III* issued, the District Court granted plaintiffs' motion for a third trial to put in evidence on the seniority system in light of *Teamsters*. *Swint* v. *Pullman-Standard* (*Swint IV*), 15 FEP Cas. (BNA) 1638 (N.D. Ala. 1977) (App. 178a). The court thereafter issued an opinion reaffirming its *Swint III* ruling. *Swint* v. *Pullman-Standard* (*Swint V*), 15 FEP Cas. (BNA) 730 (N.D. Ala. 1978) (App. 182a).

continued to be infected with racial considerations, albeit to a lesser degree than during the pre-Act period." *Id.* at 529 (App. 214a).

On the promotions issue, the Court of Appeals characterized the District Court's discussion of the importance of departmental experience to the selection of hourly supervisors[19] as a "limitation" on black promotional opportunities that had to be justified by business necessity. The Court of Appeals then disagreed with the District Court that Pullman's business needs were "sufficiently compelling," and further dismissed the evidence of a disproportionate rate of black refusal of promotions as "undeniably emanat[ing] from the very discrimination which the class members seek to eliminate." *Id.* at 536 (App. 226a-227a).[20]

D. This Court's Ruling

In *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273 (1982) (App. 231a), this Court held that the Court of Appeals in

19 Without squarely rejecting the District Court's precise findings on this point as "clearly erroneous," the Court of Appeals obliquely observed that "a substantial number of salaried and temporary foremen supervise departments in which they have never worked." *Swint VI*, 624 F.2d at 535 (App. 226a). This observation, unaccompanied by record citation, reveals the pitfalls inherent in *Swint VI*'s *de novo* reappraisal of the evidence. For example, the Court of Appeals did not explain whether the foremen in question had acquired relevant experience from work in related departments, a factor the District Court rightly considered highly material (see note 16, *supra*). Moreover, the Fifth Circuit's observation did not join issue with the District Court's opinion: the trial court's findings were that departmental experience was required for promotion to hourly foreman positions and that successful performance as an hourly foreman made one eligible for a salaried position, typically (but not necessarily) in the same department. As we develop in our third point, the then Fifth Circuit's proper course under Fed. R. Civ. P. Rule 52(a) if it suspected some factual error—and surely the Eleventh Circuit's unmistakable obligation after this Court's *Swint* ruling—was to remand to the District Court rather than to substitute its own findings.

20 The Court of Appeals in *Swint VI* here flatly contradicted its earlier approval, in *Swint II*, 539 F.2d at 104 (App. 137a), of consideration of the higher rate of refusal among black employees of foreman promotions.

Swint VI had exceeded the proper scope of review in its treatment of the trial court's findings on the validity of the seniority system. The Fifth Circuit was held to have proceeded in an "incredible" manner, explicable only in terms of that Circuit's position that "its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also . . . permit[s] it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law." *Id.* at 293 (App. 248a). Whether "ultimate" facts or not, this Court insisted, all factual issues are subject to Rule 52(a)'s clearly erroneous standard; the Court of Appeals' proper role is limited to identifying legal error and "remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Id.*

E. Proceedings on Remand from the Supreme Court

On remand, the Fifth Circuit returned the case to the trial court for further findings on the "locking-in" effect of the seniority system; it did not, however, reconsider its determination as to the initial assignments and promotions issues. *Swint* v. *Pullman-Standard* (*Swint VIII*), 692 F.2d 1031 (5th Cir. 1982) (App. 259a). Confined by this "limited remand,"[21] the District Court held that *Swint VI* was "law of the case" and that it was bound to find Pullman liable on those issues.

On cross-appeals, the Eleventh Circuit (which inherited this litigation) reached several conclusions warranting this Court's review. *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549 (11th Cir. 1988) (App. 1a). First, in complete disregard of this Court's intervening decision in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), the Court of Appeals reaffirmed *Swint VI*'s finding of liability on the promotions issue. Plaintiffs were held to have made out a prima facie case under the

21 Although *Swint VIII* contains language suggesting a broader remand, the ruling of the Eleventh Circuit below makes clear that "the case was returned to the district court under a limited remand," 854 F.2d at 1578 (App. 50a), and that this Court's *Swint* ruling "did not *change* the law" and was limited to the seniority system issue, *id.* at 1582 (App. 57a) (emphasis in original).

disparate impact theory despite the absence of any showing of disparity with respect to the promotion-eligible group, on the premise that all of Pullman's black employees were "theoretically eligible for positions at least as temporary supervisors. . . ." *Swint XI*, 854 F.2d at 1581 (App. 55a). The burden of persuasion was therefore placed on Pullman to demonstrate the business necessity of its supervisory requirements. In the Eleventh Circuit's view, this Court's *Swint* ruling contained "no suggestion" that *Swint VI*'s liability finding on promotions was infirm, and hence required no reconsideration of that determination. Rather, *Swint VI* was viewed as holding that neither prior experience in the particular or related department nor the greater incidence of refusals by black employees to become hourly foremen could be relied upon because of Pullman's past initial assignment discrimination. *Id.* at 1582 (App. 57a).

Second, the court ruled that Swint and Johnson were appropriate class representatives even though they were both hired *before* the effective date of Title VII and hence had no personal stake with respect to the post-Act initial assignments claim. The court reasoned that since plaintiffs were challenging a "general policy of discrimination," they were adequate representatives within an exception to this Court's holding in *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). *Swint XI*, 854 F.2d at 1564, 1572-73 (App. 24a, 38a-40a).[22] Third, the court held that the initial assignments issue was properly treated as an independent claim, *id.* at 1571 (App. 36a-37a), without explaining why this Court's *Swint* opinion did not require reconsideration of that question as well.

22 The court acknowledged that "Pullman's argument that it had no basis on which to raise a standing claim earlier in the proceeding is persuasive. *Falcon* was new law; in fact, the decision reversed a ruling from this circuit." *Swint XI*, 854 F.2d at 1572 (App. 38a).

REASONS FOR GRANTING THE WRIT

I. This Case Raises Significant Questions as to the Appropriate Framework, after *Watson* v. *Fort Worth Bank & Trust*, for Disparate Impact Challenges to Subjective, Multicriteria Selection Systems for Supervisory Personnel.

Responding to the need to provide some method of challenging subjective selection systems which may be used as a covert means for accomplishing intentional discrimination, this Court in *Watson* v. *Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), upheld the use of the disparate impact theory to challenge such systems. Justice O'Connor's plurality opinion recognizes, however, the peculiar dangers of this theory when it is applied not to scored tests and other proxies for individualized consideration initially envisioned in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), but to subjective, multicriteria selection systems. So applied, it has the potential to subject every facet of an employer's decision-making process to burdensome, difficult-to-achieve validation requirements, thus creating virtually irresistible pressure to engage in quota practices in order to avoid those requirements. Such a result, the *Watson* plurality cautioned, would be contrary to at least the spirit, if not the letter, of Congress' judgment in Section 703(j) of Title VII, 42 U.S.C § 2000e-2(j), that this statute does not compel racially-balanced hiring and promotions.

As the Court of Appeals applied the *Griggs* approach to Pullman's promotion practices—and as it rejected out-of-hand the District Court's careful attempt to identify the appropriate group of promotion-eligible black workers and to take into consideration Pullman's aggressive post-Act measures to place its black workers on an equal footing—the message to employers to hire and promote on a quota basis is unmistakably clear. The Court has heard argument this Term in *Atonio* v. *Wards Cove Packing Co.*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-1387), to consider post-*Watson* issues with respect to the hiring of entry-level workers. This case presents an opportunity for establishing the appropriate ground-rules for the very different context of promotion of supervisory personnel.

A. The Eleventh Circuit's Refusal to Require Plaintiffs to Demonstrate Disparate Impact with Respect to the Group of Promotion-Eligible Blacks Conflicts with Several Decisions of this Court and Presents a Division Among the Circuits.

The Eleventh Circuit held that plaintiffs were not required to demonstrate disparate impact with respect to the promotion-eligible group. Although acknowledging the need in theory to establish some level of a "relevance threshold" concerning eligibility, the Court of Appeals deemed that threshold met here simply by comparing "the percentage of blacks in the Pullman workforce, all of whom were theoretically eligible for positions at least as temporary supervisors, with the percentage of blacks who were actually selected." *Swint XI*, 854 F.2d at 1581 (App. 55). The court thus swept aside the District Court's contrary factual finding that all Pullman workers, black or white, were *not* "theoretically eligible" for all temporary foreman positions, but rather that experience in the particular or related department was normally required. *See Swint III*, 15 FEP Cas. at 151 & n.18 (App. 167a, 176a). Moreover, the Eleventh Circuit blanketly rejected Pullman's stated promotional criteria for salaried foreman positions, which included knowledge of particular departments and successful experience as a temporary foreman, as either "impossible to incorporate into statistical proof or . . . themselves the result of discrimination." *Swint XI*, 854 F.2d at 1581 (App. 56a).

In effect, then, the Eleventh Circuit permitted plaintiffs to put Pullman to the burden of proving business necessity through a gross, "bottom line" comparison of the percentage of black workers to the percentage of black supervisors—a comparison which wholly fails to take into account minimal threshold qualifications. This approach, longstanding with the Eleventh Circuit,[23] reflects a form of "bottom line" reasoning

23 In *Powers* v. *Alabama Department of Education*, 854 F.2d 1285 (11th Cir. 1988), the Eleventh Circuit insisted that *Watson* required no change in its well-established position, reflected in *Swint XI* as well as *Griffin*

repudiated in *Connecticut* v. *Teal*, 457 U.S. 440 (1982). Moreover, it contradicts the *Watson* plurality's insistence that plaintiffs are "responsible for isolating and identifying the specific employment practices" causing the alleged adverse impact, and for demonstrating that those practices in fact "caused" the minority group exclusion. *See Watson*, 108 S.Ct. 2788-89.

This Court has made clear that statistical analysis of discrimination must reflect an assessment of the eligible applicant or employee pool. Thus, in *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977), a disparate treatment case, this Court cautioned that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Even in the context of voluntary affirmative action programs, the type of "imbalance" that may legitimately provide a basis for such preferences requires a comparison of those actually hired or promoted with "those in the labor force who possess the relevant qualifications." *Johnson* v. *Transportation Agency*, 480 U.S. 616, 632 & 633 n.10 (1987) (defining the Title VII prima facie case). This principle was most recently reaffirmed in *City of Richmond* v. *V.A. Croson Co.*, 109 S. Ct. 706, 725 (1989): "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[24]

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v. *Carlin*, 755 F.2d 1516 (11th Cir. 1985). In the Court of Appeals' view, "plaintiffs alleging class-wide discrimination in promotions are not required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact," and a prima facie case may be established without accounting for the absence of relevant experience in a supervisory line of progression. *See Powers*, 854 F.2d at 1293-94.

24 It offers little comfort to suggest, as the Court of Appeals did, that plaintiffs should be free to mount *Griggs* suits without regard to "employer-specific qualifications" because such qualifications "should be subjected to the light of day and evaluated to see if they are truly necessary to the employ-

The holding of the Eleventh Circuit below squarely conflicts with the position of the Ninth Circuit and, in all probability, the Seventh Circuit as well. Applying *Hazelwood*, the Ninth Circuit would insist on a qualified labor pool comparison in the case of a disparate impact challenge to the promotion policies of an employer, like Pullman, who promotes from within. Thus, in *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475, 484 (9th Cir. 1983), the court held that in "promotion cases, it will be necessary for the plaintiff to show that the pool of eligible employees is qualified for promotion to a position for which it is manifest that special skills are required." *Moore* specifically applied this principle to first-line supervisory positions: As "the identification of a job position as 'supervisor' implies at least a modicum of job-related experience," it was plaintiff's responsibility "to identify a pool of employees eligible for supervisory positions who possessed the requisite experience." *Id.* at 485.[25]

More recently, the Seventh Circuit has recognized, in *Cox* v. *City of Chicago*, Nos. 88-2598, 88-2599 (7th Cir. Jan. 27, 1989), that *Watson*'s identification and causation requirements preclude plaintiffs from establishing a prima facie impact case through "underrepresentation statistics," even when challeng-

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er's business." *Swint XI*, 854 F.2d at 1582 n.50 (App. 56a). Statistics based on an employee population "containing individuals lacking minimal qualifications for the job" are simply of "little probative value," *Watson*, 108 S. Ct. at 2790 (plurality opinion), and hence are not sufficient to impose burdensome validation requirements on employers. In any event, the District Court expressly found that the departmental experience requirement for hourly foremen was "justified by business necessity." *Swint III*, 15 FEP Cas. at 151 (App. 167a).

25 Several pre-*Watson* rulings are consistent with the Eleventh Circuit. *See, e.g., Shidaker* v. *Tisch*, 833 F.2d 627 (7th Cir. 1986), *cert. denied*, 108 S. Ct. 2900 (1988); *Segar* v. *Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). However, unlike the Court of Appeals below, both the Seventh Circuit in *Shidaker* and the D.C. Circuit in *Segar* would at least permit a defendant to defeat a prima facie case by showing that plaintiff's statistical disparity did not account for relevant experience. *See Shidaker*, 833 F.2d at 633; *Segar*, 738 F.2d at 1276-77. In addition, *Shidaker* relies on an "underrepresentation statistics" approach that may no longer reflect the Seventh Circuit's view. *See Cox* v. *City of Chicago*, Nos. 88-2598, 88-2599, slip op. at 10 (7th Cir. Jan. 27, 1989) (questioning *Shidaker* and *Griffin* v. *Carlin*, *supra*).

ing subjective promotion systems. As the Seventh Circuit now acknowledges, plaintiffs must prove adverse impact through "eligibility rate statistics" that focus on the pool of blacks qualified for the higher-level position: "Eligibility rate statistics, not underrepresentation statistics, encompass this causation requirement." *Cox*, slip op. at 11. By contrast, the Eleventh Circuit's view is that *Watson* requires no change at all in what is in essence its longstanding underrepresentation-statistics approach. *See Powers v. Alabama Department of Education*, 854 F.2d 1285, 1293-94 (11th Cir. 1988); note 23, *supra*.

This Court should grant certiorari both to resolve this conflict and to clarify the plaintiff's burdens in a disparate impact challenge to subjective multicriteria selection systems for supervisory personnel.

B. The Court of Appeals' Allocation of the Burden of Persuasion to the Employer to Prove the Necessity of its Business Requirements for Supervisor Promotions was Improper Under *Watson*.

The rationale for allowing a disparate impact challenge to subjective systems is that it serves as a useful adjunct to an intentional discrimination case—to capture situations where "the problem of subconscious stereotypes and prejudices would remain." *Watson*, 108 S. Ct. at 2786. The *Watson* plurality urged, however, that the "business necessity" or "job-relatedness" doctrine, as applied to subjective systems, should not be interpreted as shifting the ultimate burden of proof to the defendant:

> "On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate reasons, the plaintiff must 'show that other tests or selection devices, without a similar undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' Factors such as the cost or

other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson*, 108 S. Ct. at 2790 (citation omitted).

In this case, the Court of Appeals misconceived the proper allocation of burdens in a *Watson*-type challenge. The court held that "[t]he burden—not just of production but of persuasion—was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity," and that "Pullman had offered no legally acceptable evidence that its subjective selection procedure was a business necessity." *Swint XI*, 854 F.2d at 1580 (App. 53a). Even on the assumption *arguendo* that a prima facie case had been established, the burden-allocation below was improper on two counts. First, Pullman's burden should have been one of production only, of producing evidence of legitimate business reasons bearing "'a manifest relationship to the employment in question'"—similar to that which sufficed in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); *see Watson*, 108 S. Ct. at 2790-91 (plurality opinion).[26] The District Court's findings in *Swint III* make clear that Pullman successfully carried such a burden, thus removing any basis for a reasonable inference that its departmental experience requirement for hourly foremen or its use of subjective criteria was a pretext for intentional discrimination. Second, the appeals court erred in relieving plaintiffs of their ultimate burden to show reasonable alternative selection criteria,[27] for in the absence of such proof the inference of pretextual discrimination—which is the

26 In *Powers*, *supra*, the Eleventh Circuit held despite *Watson* that the burden of persuasion remains with the defendant. *See* 854 F.2d at 1292 n. 11.

27 The Court of Appeals clearly placed this burden on Pullman, requiring that its supervisory requirements "must 'not only foster safety and efficiency, but must be essential to that goal . . . and there must not be an acceptable alternative that will accomplish that goal equally well with a lesser differential racial impact.' " *Swint VI*, 624 F.2d at 536 (App. 226a), *quoting Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979).

principal focus of a *Watson*-type challenge—cannot be sustained.[28]

C. The Court of Appeals Improperly Commingled Disparate Treatment and Disparate Impact Theories.

Since Title VII plaintiffs may be expected, after *Watson*, to utilize both disparate treatment and disparate impact theories in the same challenge to a subjective system, this Court should grant review to clarify the extent to which findings in the treatment phase of a case can be used to impeach or undermine the employer's rebuttal case in the impact phase. A recurring theme of both the Eleventh Circuit opinion, and the *Swint VI* ruling it reaffirms, is that Pullman could not properly rely on a departmental experience requirement or evidence of a disproportionate refusal of black workers to accept hourly foreman positions because it had been found to have engaged in discriminatory initial assignments. *See Swint XI*, 854 F.2d at 1582-83 (App. 57a–58a); *Swint VI*, 624 F.2d at 536 (App. 227a).

In so ruling, the Court of Appeals impermissibly blurred the critical distinction between treatment and impact theories, disregarding the central limitations of each theory. Liability for disparate treatment requires a finding of discriminatory motivation. This was found (by the Court of Appeals) to exist for a particular period (October 1965-January 1969) and only with respect to one aspect of the employer's operations (departmental assignment of new hires). That finding was then used by the court to nullify, as a practical matter, the employer's ability to maintain an otherwise legitimate supervisor selection system, but without any proof of intentional discrimination affecting such selections. In the absence of a finding of plant-wide intentional discrimination infecting all of Pullman's selection processes—a finding never made in this case and one which could not be made on this record—the Eleventh Circuit effected the functional equivalent of such a finding by disallowing Pull-

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28 Indeed, the District Court found that "[t]he only suggested alternative in the evidence, that by one of plaintiffs' witnesses, was that [plant-wide] seniority should be followed in making appointments of foremen. An objective standard to be sure, but hardly an apt one." *Swint I*, 11 FEP Cas. at 958 n.54 (App. 102a).

man's business-necessity rebuttal case. As this part of the case was predicated on an impact rather than intentional bias theory, Pullman was entitled to a fair hearing on the business justification for its supervisory requirements.

II. The Eleventh Circuit's Holding that Individuals Hired Outside the Liability Period and Who Never Asserted Individual Claims of Discriminatory Denial of a Supervisor Promotion Are Proper Class Representatives to Assert Initial Assignment and Promotions Claims Conflicts with the Decisions of This Court and Other Courts of Appeals.

The Eleventh Circuit held that respondents Swint and Johnson were proper representatives to assert class claims regarding initial assignments and supervisor promotions even though, at the outset of the suit as well as at the time of certification, they had not the slightest personal stake in either claim.[29] Acknowledging that *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), had rejected the Fifth Circuit's previous "across-the-board" approach to Title VII class actions, the Court of Appeals reasoned that this case came within the "general policy of discrimination" exception identified in footnote 15 of *Falcon*. *See Swint XI*, 854 F.2d at 1573 (App. 40a). The Court of Appeals' sweepingly broad interpretation of *Falcon* effectively permits the exception to swallow the rule, placing in the hands of any artful pleader the means to accomplish "across-the-board" certification in virtually every Title VII case. Moreover, the ruling below directly conflicts with decisions of other circuits and disregards Article III limitations on class representative standing. This case thus presents a well-defined conflict requiring this Court's resolution, as well as the opportunity to clarify the reach of *Falcon* and to reaffirm the standing requirements imposed by Article III.

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29 Both named plaintiffs were hired and initially assigned well before the effective date of Title VII and commencement of the liability period. Moreover, neither could have been injured by Pullman's promotion practices; indeed, Swint was a vocal, militant opponent of black employees who agreed to serve as supervisors, and Johnson had himself rejected an offer of promotion. (*See* notes 7 & 8, *supra*).

A. This Court Should Grant Review to Clarify the Proper Reach of *Falcon*, an Issue of Recurring Importance in the Administration of Title VII, and to Resolve the Division Among the Circuits.

The central teaching of both *Falcon*, and its predecessor *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), is clear: careful attention to the typicality and commonality requirements of Rule 23 "remains indispensable" even in Title VII suits. *Falcon*, 457 U.S. at 157; *Rodriguez*, 431 U.S. at 405. *Falcon* expressly rejected the "across-the-board" doctrine as undermining Rule 23's insistence on an essential identity of interest between the class and its representatives. *Falcon*, 457 U.S. at 157-59. Thus, this Court demands that a class representative "be part of the class and 'possess the same interest and suffer the same injury' as the class members," *Rodriguez*, 431 U.S. at 403, *quoting Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974); and that the class claims be limited "to those fairly encompassed by the named plaintiff's claims," *Falcon*, 457 U.S. at 156, *citing General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980).

Here, the Eleventh Circuit has resurrected precisely what *Rodriguez* and *Falcon* sought to put to rest. The named plaintiffs were held to be proper Rule 23 representatives because "[f]rom the start, the plaintiffs' basic complaint has been that Pullman prevented black employees from moving into its higher-level positions." *Swint XI*, 854 F.2d at 1573 (App. 39a). Characterizing the injuries suffered by the named plaintiffs and the class as "[t]he same injury"—that is, "being locked into . . . lower-paying jobs"—the Eleventh Circuit determined that the only real question was through which employment practice this result ultimately came about—"whether it was the discrimination in assignments or the nature of the seniority system, or both, that prevented blacks from moving up the job ladder." *Id.* (App. 40a) Yet, the Court of Appeals failed to require, as mandated by *Rodriguez* and *Falcon*, that at least one of the two named plaintiffs be injured by each—not to say *any*—of these practices.

The Eleventh Circuit attempted to fit the facts of this case into one of two exceptional situations recognized in footnote 15

of *Falcon*. Specifically, the court invoked the so-called second exception as authority for its conclusion that Pullman "operated under a general policy of discrimination" that manifested itself in the challenged practices "in the same general fashion." *See Falcon*, 457 U.S. at 159 n.15. In this case, however, there was neither a single employment practice nor a subjective decision-making process identified as common to both assignments and supervisor promotions. Although the named plaintiffs may have been able to claim injury from the seniority system insofar as it allegedly perpetuated pre-Act discrimination, they "could have suffered no injury as a result of" post-Act discrimination in departmental assignments of new hires, "and they [are] therefore, simply not eligible to represent a class of persons who did allegedly suffer [such] injury." *Rodriguez*, 431 U.S. at 403-404. The same applies to their claimed status as class representatives on the supervisor promotions issue. To hold, as the Court of Appeals did, that a policy of such amorphous scope as keeping blacks "locked into . . . lower-paying jobs" or preventing them "from moving up the job ladder" satisfies the "general policy" exception is to accord footnote 15 an unwarranted breadth that threatens to swallow the very rule announced in the body of the *Falcon* opinion.

The reservation in footnote 15 has generated inconsistent applications of *Falcon* in the various circuits, leading some courts to believe that the *Falcon* holding, as qualified by footnote 15, does not completely foreclose across-the-board actions.[30] Other courts have construed *Falcon* more strictly, undertaking exacting reviews of class certification and rejecting expansive applications of footnote 15 that would essentially revive "across-the-board" attacks.[31]

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30 *See, e.g., Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (standing affirmed where named plaintiff "attempted to prove that [the employer] had denied women opportunities to advance themselves, either as she sought to do, by transfer, or as other class members sought, by training or promotion," through various employment practices including the use of a subjective evaluation system).

31 *See, e.g., Wagner* v. *Taylor*, 836 F.2d 578, 593 (D.C. Cir. 1987) (employee denied promotion could not represent a class consisting of disap-

Moreover, the ruling below directly conflicts with decisions of the Third and District of Columbia Circuits over whether employees, like named plaintiffs here, hired outside the liability period are proper class representatives to challenge discrimination in initial assignments occurring during the liability period. *See Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985), *aff'd on other grounds*, 482 U.S. 656 (1987) ("All of the named plaintiffs, however, were originally hired outside the limitations period, and therefore, none have a viable complaint about discrimination in initial assignment. Thus, no representative adequately represents the class on this particular claim."); *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1409-10 (D.C. Cir. 1988), *pet. for cert. filed*, 57 U.S.L.W. 3334 (U.S. Nov. 8, 1988) (No. 88-699) (named plaintiffs could not represent class challenge to high school diploma requirement of apprenticeship program because they "were too old to challenge the . . . requirement within the statutory limitations periods, or were not injured by it because they had no interest in enrolling in the [program] during those periods").[32]

The class representative holding below also conflicts with the Eighth Circuit over whether employees, like named plaintiffs here, who never alleged individual claims of discriminatory denial of a supervisory position may represent a class challenge to allegedly discriminatory promotion practices. *See Roby* v. *St. Louis Southwestern Ry.*, 775 F.2d 959, 962 (8th Cir. 1985) ("[b]ecause [named plaintiffs] were not affected by the Rail-

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pointed applicants and of employees who were fired, denied promotions, or discriminated against in the terms and conditions of employment); *Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) (same application procedure and entirely subjective criteria applicable to both employees and outside applicants for same jobs does not constitute significant proof warranting single class treatment within meaning of footnote 15); *Lilly* v. *Harris-Teeter Supermarket*, 720 F.2d 326, 333-34 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (named plaintiff's claim, although overlapping on several important pieces of proof with class claims, nonetheless failed to justify single class treatment for more than one employment practice as provided in footnote 15).

32 *See also International Woodworkers* v. *Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1270 (4th Cir. 1981) (pre-*Falcon* decision consistent with Eleventh Circuit below).

road's promotion policies, they were not proper class representatives for those employees who are affected by these policies.").

This Court is thus presented with a conflict in the circuits over whether a named plaintiff may represent a class claim of discriminatory initial assignments when that plaintiff's initial assignment occurred outside the liability period, or a class claim of discriminatory denials of promotion even though that plaintiff lacked an individual promotion claim. Inasmuch as these are issues that arise frequently in Title VII cases, this Court should grant certiorari in order to resolve the conflict and clarify the scope of the purported "general policy of discrimination" exception reserved in footnote 15 of *Falcon*.

B. The Eleventh Circuit's Holding that the Named Plaintiffs are Adequate Class Representatives Violates Article III Limitations on Class Action Standing.

A private Title VII suit brought on behalf of a class depends not only on the satisfaction of Rule 23 but also upon a representative plaintiff who has constitutional standing to raise the class claims. To meet the threshold requirement imposed by Article III, a named plaintiff must satisfy two prerequisites. First, he " 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' " *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974), *quoting Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). Second, a named plaintiff must have suffered an injury in the same manner as have the members of the class he seeks to represent. *See O'Shea*, 414 U.S. at 495; *Sosna* v. *Iowa*, 419 U.S. 393, 402-03 (1975). Indeed, this Court has repeatedly cautioned:

> "It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. *Nor does a plaintiff who has been subject to injurious conduct of one kind possess* by virtue of that injury *the necessary stake in litigating conduct of another kind, although similar*, to which he has not been subject."

Blum v. *Yaretsky*, 457 U.S. 991, 999 (1982) (emphasis supplied); *see Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-167 (1972).

The Court of Appeals below has departed inexplicably from the longstanding requirements of Article III and the decisions of this Court in neglecting to address whether the named plaintiffs had constitutional standing to adjudicate each of the claims they now seek to raise on behalf of the class.[33] The named plaintiffs never had a constitutionally cognizable initial assignments claim. Furthermore, insofar as they were never injured individually by the denial of a promotion, they do not now and never did have constitutional standing to assert a challenge to Pullman's promotion practices and hence lacked standing to litigate that claim on behalf of a class.

The Eleventh Circuit's summary disregard of the Article III dimension of plaintiffs' class representative status presents a conflict with rulings of this Court and the Fifth Circuit, *see e.g.*, *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); *Vuyanich* v. *Republic National Bank*, 723 F.2d 1195, 1200 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984),[34] warranting a grant of certiorari.

III. The Eleventh Circuit's Refusal to Reconsider its 1980 *De Novo* Factfinding in Light of this Court's *Swint* Opinion Warrants Review as an Exercise of Supervisory Authority.

The Eleventh Circuit took the view that this Court's opinion in "*Swint VII* did not *change* the law"—that it had not engaged in improper factfinding except as to the seniority system. *Swint XI*, 854 F.2d at 1582 (App. 57a) (emphasis in original). There is, however, no way to make sense of much of the Fifth Circuit's 1980 ruling as to issues other than the seniority system as

33 Although a Rule 23 case, *Falcon* implicitly recognizes the mandate of Article III underlying the requirements of Rule 23. "The mere fact," the Court stated, "that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Falcon*, 457 U.S. at 159 n.15.

34 *Swint XI* also conflicts in this regard with an earlier Eleventh Circuit ruling in *Griffin* v. *Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1729 (1988).

anything but *de novo* appellate factfinding. Although sanctioned at the time under the Fifth Circuit's "ultimate fact" doctrine, that judicial approach is squarely at odds with this Court's *Swint* opinion.

Thus, for example, on the initial assignments issue, there had been no prior finding by either the District Court or the Court of Appeals that a prima facie "pattern or practice" case of intentional discrimination had been made out. Yet, in *Swint VI*, after finding some errors in the trial judge's calculations with respect to the two IAM departments, the Court of Appeals baldly announced that it had "carefully reviewed the post-Act assignment statistics" and that "they clearly" support the plaintiffs' contention on the existence of a discriminatory post-Act initial assignments policy. *Swint VI*, 624 F.2d at 529-30 (App. 214a). But here, as on the seniority issue, "the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination," *Swint VII*, 456 U.S. at 287 (App. 243a). Moreover, even if, for the sake of argument, the District Court had made an error of law or the appeals court had some doubts about the trial court's statistical analysis, this Court's *Swint* ruling teaches that a remand for new factfinding was the only proper course consistent with Rule 52(a). The existence of discriminatory intent with respect to the post-Act initial assignments,

> "whether an ultimate fact or not . . . is a factual matter subject to the clearly-erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Id.* at 293 (App. 248a).

On the promotion issue, the Eleventh Circuit attempted to characterize its earlier ruling as based on the District Court's misapplication of the legal standard. Even if true, this called, at most, for a remand as opposed to appellate factfinding. But such a characterization of *Swint VI* does not, in any event, withstand analysis. The District Court found that Pullman's

limitation of hourly foreman promotions to employees with experience in a particular or closely-related department was "justified by business necessity under the evidence in this case." *Swint III*, 15 FEP Cas. at 151 (App. 167a). The *Swint VI* court simply disagreed "that the business need advanced by the defendants for the limitation which restricts the promotion of blacks to supervisory positions is sufficiently compelling to override the significant racial impact." *Swint VI*, 624 F.2d at 535-36 (App. 226a).[35] This was appellate factfinding, pure and simple, which the Eleventh Circuit has chosen to reaffirm in the face of this Court's contrary instructions on the proper role of appellate review.

The Court is understandably reluctant to review opinions for compliance with Rule 52(a), but here the Eleventh Circuit's failure to conform to its strictures in the very case in which this Court insisted on such compliance warrants a grant of certiorari in the exercise of the Court's supervisory authority.

IV. The Holding Below that Alabama's Six-Year "Non-Residual" Statute Applies to § 1981 Claims Warrants Review in Light of *Owens* v. *Okure*.

The District Court held that Alabama's residual statute of limitations for personal injury actions[36] should apply to date

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35 The appeals court may also have been unduly influenced by its now rejected perpetuation-of-pre-Act-discrimination ruling on the seniority system issue, finding that "these variables relied upon by the district court do not weigh heavily enough to lessen the appellants' empirical conclusions that black employees were locked in the lower paying jobs and departments." *Swint VI*, 624 F.2d at 536 (App. 227a). Despite the Eleventh Circuit's effort at minimizing this language, 854 F.2d at 1583 (App. 59a), the so-called "locking-in effect" was clearly (and improperly) used to discredit Pullman's business-necessity rebuttal case.

36 *Swint* v. *Pullman-Standard* (*Swint X*), No. CV71-P-0955 S (N.D. Ala. Nov. 26, 1986) (App. 278a). That statute, currently codified at Section 6-2-38 of the Alabama Code, now provides for a two-year statute of limitations. However, prior to 1985, the statute, then codified as Section 6-2-39(a)(5) of the state code, provided for a one-year period.

recovery for plaintiffs' § 1981 claims.[37] The Court of Appeals reversed, opting for the six-year Alabama statute for actions alleging "trespass to person or liberty."[38] Subsequent to the Eleventh Circuit's pronouncement, however, this Court issued its decision in *Owens* v. *Okure*, 109 S. Ct. 573 (1989), holding that where state law provides more than one statute of limitations for personal injury actions, courts considering § 1983 claims should borrow the limitations period from that state's general or residual statute. Moreover, this Court specifically referred to the statute selected by the District Court below as the one applicable to § 1983 claims in Alabama. *Owens* v. *Okure*, 109 S. Ct. at 580 n.9. Insofar as the statute of limitations that applies to claims under § 1983 should apply equally to those brought under § 1981, *see Goodman* v. *Lukens Steel Corp.*, *supra*, 777 F.2d at 120, it is clear that the limitations period applicable to the instant case is not the one imposed by the Court of Appeals but the one-year provision contained in Alabama's residual statute.

37 This point assumes, for the sake of discussion, that § 1981 reaches private discrimination—an issue currently under reconsideration in this Court in *Patterson* v. *McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987).

38 *Swint XI*, 854 F.2d at 1567-70 (App. 29a-35a). Ala. Code § 6-2-34(1) (1977).

CONCLUSION

For all these reasons, Petitioner requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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